

APPEAL NO. 032959
FILED JANUARY 6, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 3, 2003, and concluded on September 15, 2003. With regard to the only issue before him, the hearing officer determined that the respondent's (claimant) impairment rating (IR) is 18% as assessed by the designated doctor, whose amended alternative report was not contrary to the great weight of other medical evidence.

The appellant (self-insured) appeals, contending that the designated doctor failed to properly or accurately apply the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides 3rd edition) and that another doctor's 9% IR is the only other valid IR in evidence. The file does not contain a response from the claimant.

DECISION

Affirmed, as modified.

This case has a somewhat tortuous procedural history. The parties stipulated that the claimant sustained a compensable (low back) injury on _____. In a report dated June 22, 2000, apparently the then-treating doctor certified maximum medical improvement (MMI) on that date with a 9% IR based on Table 49, Section (IV)(A) (single level operation for spondylolisthesis) of the AMA Guides 3rd edition. The claimant was subsequently seen by a number of doctors including Dr. H, who the parties stipulated was the Texas Workers' Compensation Commission-selected designated doctor. All of the doctors who assessed IRs after the initial treating doctor's report, including Dr. H, used the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to _____) (AMA Guides 4th edition).

At the July 3, 2003, CCH, the hearing officer asked the parties if they could stipulate to an MMI date to which the self-insured's attorney replied "I don't think we can." The hearing officer asked if there was a "des doc" and when told there was stated, "I'll find that stipulation was made anyway," however, at neither the July 3, nor the September 15, 2003, CCH sessions was there a stipulation or finding of an MMI date. However, the hearing officer had made fairly clear that he was going to accept the designated doctor's MMI date. In a report dated July 31, 2003, Dr. H adopted a February 7, 2002, MMI date based on another doctor's evaluation. In order to complete the hearing officer's decision and order, we hold that by inference in order to have a valid IR, the hearing officer intended to find an MMI date of February 7, 2002, and we so modify the hearing officer's decision and order.

At the July 3, 2003, CCH it was determined that Dr. H had used the incorrect version of the AMA Guides and the hearing officer directed that the claimant be reexamined by Dr. H using the AMA Guides 3rd edition. Dr. H did so and in a report dated July 31, 2003, assessed a 20% IR based on 13% impairment from the specific disorder Table 49, Section (IV) (B) and (C), 5% impairment for loss of range of motion (ROM) and a 4% whole person impairment for a neurologic deficit.

The CCH was reconvened on September 15, 2003, and although the designated doctor's report was not placed in evidence, the self-insured argued then, and on appeal here, that the claimant does not have the objective clinical evidence of segmental instability or spondylolisthesis necessary for a rating under Table 49, Section IV. The hearing officer, in a letter dated September 16, 2003 (Hearing Officer's Exhibit No. 3), requested clarification from Dr. H for "specifically the factors that place the claimant in Disorder class IV." Dr. H replied by letter dated September 30, 2003, explaining his prior rating, but also providing an "Alternate Rating" assessing an 11% impairment "as a Disorder Class III E + F, from Table 49, Page 73 of the **Guides**" (emphasis in the original) plus 5% impairment for loss of ROM and 4% impairment for "Neurological Impairment" to arrive at a combined 18% IR. The hearing officer, in his decision, determined that "segmental instability" had not been proven and adopted the designated doctor's alternative 18% IR.

The self-insured, on appeal, contends that Dr. H "misapplies the AMA Guides" because there is no "Disorder Class III E + F" in Table 49. That may be true, however, it is clear to us that the designated doctor intended to rate the claimant under Table 49, Section II (rather than III) E and F. We hold that the reference to Disorder Class III was a typographical or clerical error and Dr. H clearly intended the rating to be under Section II E and F.

The self-insured further argues that "any alleged spondylosis and/or spondylolisthesis. . . is clearly preexisting and not related to the compensable injury" while at the same time arguing that the only valid IR is the initial treating doctor's 9% IR, which was solely based on "spondylolisthesis with no surgery." The self-insured cannot have it both ways, arguing no spondylolisthesis but adopt a rating based solely on spondylolisthesis. In any event, the hearing officer made a determination that "segmental instability" had not been proven and that Section IV of Table 49 should not be used. The hearing officer's determination is sufficiently supported by the evidence.

We modify the hearing officer's decision and order to include a February 7, 2002, MMI date as inferred by the hearing officer and affirm the hearing officer's decision and order of an 18% IR as not being so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order, as modified, is affirmed.

The true corporate name of the insurance carrier is **(a certified self-insured)** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL
DALLAS, TEXAS 75201.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Edward Vilano
Appeals Judge